

KEYWORD: Guideline F

DIGEST: The Judge's failure to make a finding regarding the conflicting evidence of the amount of Applicant's monthly remainder of discretionary income was error. The error is harmless in this case, given Applicant's failure to contact his creditors. Adverse decision affirmed.

CASENO: 11-07502.a1

DATE: 12/05/2012

DATE: December 5, 2012

_____)	
In Re:)	
)	
-----)	ISCR Case No. 11-07502
)	
)	
Applicant for Security Clearance)	
_____)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On May 22, 2012, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline F (Financial Considerations) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On September 17, 2012, after the hearing, Administrative Judge LeRoy F. Foreman denied Applicant’s request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issue on appeal: whether the Judge’s decision was arbitrary, capricious, or contrary to law. For the following reasons, the Board affirms the Judge’s unfavorable decision.

The Judge made the following findings of fact: Applicant is 43 years old. He is currently married to his third wife. Applicant testified that his financial problems began in 2005, when his second wife left him. Applicant was out of town when she left, and she took all the household furnishings and a car. Everything was titled in Applicant’s name. He let his creditors repossess the household furnishings and two cars. He sold his house. Applicant underpaid his federal income taxes for 2005, 2006, 2007, and 2008. Applicant made a payment agreement, withdrew money from his 401K account, and paid the delinquent taxes for 2005, 2006, and 2007. Applicant paid the balance owed on the delinquent 2008 taxes in April 2012, resolving the debt. Applicant made no payments on a \$3,188 jewelry store account until June 2012, when he accepted an offer to settle the debt for \$599. He paid the settlement amount in June 2012. Applicant owes \$8,104 and \$7,325 respectively, on two car loans. After his wife left him in 2005, he surrendered both cars to the dealers, and the amounts due are the deficiencies after the cars were sold. Applicant has not contacted the creditors since 2005. He testified that he does not want to contact the creditors on the car loans until he has enough cash on hand to pay or settle the debts.

Applicant cannot borrow more money from his 401K until he pays off his current loan, which he expects to pay off in September 2013. He has not sought financial counseling or explored the possibility of credit consolidation. He has not considered a Chapter 13 bankruptcy. He is making minimum monthly payments on two credit card accounts. He has not incurred any additional delinquent debts. Two 2012 financial statements list Applicant’s net monthly remainder after expenses of \$1,785 and \$328, respectively.

The Judge reached the following conclusions: Applicant has displayed an inability or unwillingness to satisfy debts and a history of not meeting financial obligations. Applicant’s delinquent debts originated in 2005, but the two debts that he retired were only recently resolved. The two car loan debts remain unresolved. Although the debts other than the tax delinquencies occurred under circumstances unlikely to recur, his dilatory response to the jewelry store debt and his lack of action regarding the two delinquent car loans are sufficient to cast doubts on his current reliability, trustworthiness, and good judgment.

Applicant asserts that the Judge’s decision overstates the amount of personal income he and his current wife have available after monthly expenses are taken care of. He states that when his

wife's expenses are included, they have, at most, a couple hundred dollars available to them per month to put toward outstanding debt. Applicant essentially testified to this issue at the hearing. During his testimony he offered, and the Judge appeared to acknowledge, the fact that when his wife's expenses were considered, approximately seventy percent of the \$1,785 figure stated as a monthly remainder was consumed in additional monthly expenses for the wife. The Judge then made the observation that, given these facts, Applicant and his wife actually had a couple of hundred dollars left over at the end of the month.¹ In his decision, the Judge does not make a definitive finding regarding Applicant's end-of-month discretionary income. He simply recites the evidence of one personal financial statement listing the \$1,785 figure, and a later personal financial statement indicating that the remainder was \$328. After citing to the representations made in the two pieces of evidence, the Judge makes no finding as to which figure he views as accurate, nor does he reject the accuracy of either figure. His failure to make a finding on this point was error, given the fact that there was ample evidence in the record, which he appeared to acknowledge, indicating a reasonably accurate monthly figure.

The Board concludes, however, after reviewing the record and the Judge's decision, that the error is harmless. Contrary to Applicant's assertions, the Judge did not overstate the amount of Applicant's monthly remainder, since he made no finding on the matter. The Judge's decision does not indicate that his analysis or his ultimate conclusions were dependent on, or affected by, the amount of monthly discretionary income available to Applicant. Rather, the Judge emphasized the degree of contact with creditors when engaging in his mitigation analysis. He indicated that it was Applicant's failure to contact the jewelry store creditor until 2012, and Applicant's failure to contact the car loan creditors at all, that were the primary basis of his conclusion that doubts about Applicant's judgment and reliability were unresolved. The analysis portion of the decision focuses on Applicant's lack of action to resolve the debts in question, as opposed to a discussion about his ability to pay. The Judge's analysis is reasonably supported by the record evidence.

Applicant states that he has continually tried to take care of his financial obligations. The Board construes this argument as an assertion by Applicant that he has mitigated the government's security concerns and that the Judge should have concluded likewise. Once the government presents evidence raising security concerns, the burden shifts to the applicant to establish mitigation. The presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. See, e.g., ISCR Case No. 06-10320 at 2 (App. Bd. Nov. 7, 2007). Applicant's disagreement with the Judge's weighing of the evidence, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. See, e.g., ISCR Case No. 06-17409 at 3 (App. Bd. Oct. 12, 2007).

In this case, the Judge made sustainable findings that Applicant had neglected a number of substantial debts over a lengthy period of time. As indicated in a preceding paragraph, the Judge's

¹Hearing Transcript at 42-45.

conclusion that Applicant chose to ignore these debts over a considerable length of time was central to his analysis. The Judge noted that two of these debts remain unresolved. He adequately discussed why, given these facts, the disqualifying conduct established under Guideline F was not mitigated.

The Board does not review a case *de novo*. The favorable evidence cited by Applicant is not sufficient to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 06-11172 at 3 (App. Bd. Sep. 4, 2007). After reviewing the record, the Board concludes that the Judge examined the relevant data and articulated a satisfactory explanation for the decision, "including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). "The general standard is that a clearance may be granted only when 'clearly consistent with the interests of the national security.'" *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Therefore, the Judge's ultimate unfavorable security clearance decision is sustainable.

Order

The Judge's decision is **AFFIRMED**.

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: Jeffrey D. Billett
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: Jean E. Smallin
Jean E. Smallin
Administrative Judge
Member, Appeal Board